

United States District Court For The District of Oregon

District of Oregon

File Number: 6-08-6408-TC

**LINDLEY CONTOURS, LLC,
and NORMAN LINDLEY,**

Plaintiffs,

vs.

NOTICE OF APPEAL

**AABB FITNESS HOLDINGS, INC.,
f/k/a CONTOURS EXPRESS, INC.;
CONTOURS EXPRESS, LLC;
THOMAS D. CHRISTOPOUL;
WILLIAM G. HELTON, JR.,
PAUL M. MCNICOL;
ANDREW RUSSELL;
MAYO S. STUNTZ, JR.;
DARREN CARTER;
MICHAEL WIDENER;
CLINTON C. COOPER;
MARY SCHRAD, PILOT GROUP LLC,
PILOT GROUP L.P., and PGCE, INC.,**

Defendants.

Notice is hereby given that Lindley Contours, LLC, Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the 9th Circuit from the final judgment entered in this action on the 9th day of June 2009.

s/W. Michael Garner
Attorney for Plaintiffs
W. Michael Garner, admitted *pro hac vice*
Dady & Garner, P.A.
5100 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Telephone: (612) 359-3515
Facsimile: (612) 359-3507
Email: wmgarner@dadygarner.com

Attorneys for Plaintiffs

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CIVIL APPEALS DOCKETING STATEMENT**

| | | | | |
|----------------------|--|--|------------------------------|--|
| SEE ATTACHED CAPTION | DISTRICT: OREGON | | JUDGE: AIKEN | |
| | DISTRICT COURT NUMBER: | | 08-6408-TC | |
| | DATE NOTICE OF APPEAL FILED: | | IS THIS A CROSS APPEAL? | |
| | JULY 8, 2009 | | <input type="checkbox"/> YES | |
| | IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY): | | | |

Lindley Contours, LLC, a former franchisee of "Contours Express," a franchisor of women's fitness gyms, seeks recovery from the franchisor for its misrepresentations, violations of franchise laws unfair trade practices, and breaches of contract in connection with the sale of franchises for "Contours Express" women's fitness centers. The U.S. District Court dismissed the case upon Defendant's Motion to Dismiss in favor of arbitration.

Whether the lower court erred by dismissing Plaintiff's case when the Defendants engaged in acts inconsistent with any right to arbitrate; when Plaintiffs were prejudiced by those inconsistent acts; when individual Defendants have no right to arbitrate; and when Defendants are legally estopped from compelling arbitration.

None.

☒ Possibility of Settlement

☐ Likelihood that intervening precedent will control outcome of appeal

☐ Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (Specify)

☐ Any other information relevant to the inclusion of this case in the Mediation Program

☐ Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges

| LOWER COURT INFORMATION | | | |
|--|--|---|--|
| JURISDICTION | | DISTRICT COURT DISPOSITION | |
| FEDERAL | APPELLATE | TYPE OF JUDGMENT/ORDER APPEALED | RELIEF |
| <input type="checkbox"/> FEDERAL QUESTION <input checked="" type="checkbox"/> DIVERSITY <input type="checkbox"/> OTHER (SPECIFY): <div style="border: 1px solid black; height: 100px; width: 100%; margin-top: 5px;"></div> | <input checked="" type="checkbox"/> FINAL DECISION OF DISTRICT COURT <input type="checkbox"/> INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT <input type="checkbox"/> INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY): <div style="border: 1px solid black; height: 30px; width: 100%; margin-top: 5px;"></div> <input type="checkbox"/> OTHER (SPECIFY): <div style="border: 1px solid black; height: 30px; width: 100%; margin-top: 5px;"></div> | <input type="checkbox"/> DEFAULT JUDGMENT <input checked="" type="checkbox"/> DISMISSAL/JURISDICTION <input type="checkbox"/> DISMISSAL/MERITS <input type="checkbox"/> SUMMARY JUDGMENT <input type="checkbox"/> JUDGMENT/COURT DECISION <input type="checkbox"/> JUDGMENT/JURY VERDICT <input type="checkbox"/> DECLARATORY JUDGMENT <input type="checkbox"/> JUDGMENT AS A MATTER OF LAW <input type="checkbox"/> OTHER (SPECIFY): <div style="border: 1px solid black; height: 30px; width: 100%; margin-top: 5px;"></div> | <input checked="" type="checkbox"/> DAMAGES: SOUGHT \$ <div style="border: 1px solid black; width: 80px; text-align: center;">850,000</div> AWARDED \$ <div style="border: 1px solid black; width: 80px; height: 20px;"></div> <input type="checkbox"/> INJUNCTIONS: <input type="checkbox"/> PRELIMINARY <input type="checkbox"/> PERMANENT <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED <input type="checkbox"/> ATTORNEY FEES: SOUGHT \$ <div style="border: 1px solid black; width: 80px; height: 20px;"></div> AWARDED \$ <div style="border: 1px solid black; width: 80px; height: 20px;"></div> <input type="checkbox"/> PENDING <input type="checkbox"/> COSTS: \$ <div style="border: 1px solid black; width: 80px; height: 20px;"></div> |

CERTIFICATION OF COUNSEL**I CERTIFY THAT:**

1. COPIES OF ORDER/JUDGMENT APPEALED FROM ARE ATTACHED.
2. A CURRENT SERVICE LIST OR REPRESENTATION STATEMENT WITH TELEPHONE AND FAX NUMBERS IS ATTACHED (SEE 9TH CIR. RULE 3-2).
3. A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SERVED IN COMPLIANCE WITH FRAP 25.
4. I UNDERSTAND THAT FAILURE TO COMPLY WITH THESE FILING REQUIREMENTS MAY RESULT IN SANCTIONS, INCLUDING DISMISSAL OF THIS APPEAL.

s/W. Michael Garner

Signature

July 8, 2009

Date**COUNSEL WHO COMPLETED THIS FORM**

| | |
|-----------|---|
| NAME | W. MICHAEL GARNER, ESQ. |
| FIRM | DADY & GARNER, P.A. |
| ADDRESS | 5100 IDS CENTER, 80 SOUTH 8TH STREET |
| CITY | MINNEAPOLIS |
| STATE | MINNESOTA |
| ZIP CODE | 55402 |
| E-MAIL | wmgarner@dadygarner.com; bjbertram@dadygarner.com |
| TELEPHONE | 612-359-9000 |
| FAX | 612-359-3507 |

**THIS DOCUMENT SHOULD BE FILED IN DISTRICT COURT WITH THE NOTICE OF APPEAL. **

IF FILED LATE, IT SHOULD BE FILED DIRECTLY WITH THE U.S. COURT OF APPEALS.

**LINDLEY CONTOURS, LLC,
and NORMAN LINDLEY,**

Plaintiffs,

vs.

**FULL CASE TITLE FOR
DOCKETING STATEMENT**

**AABB FITNESS HOLDINGS, INC.,
f/k/a CONTOURS EXPRESS, INC.;
CONTOURS EXPRESS, LLC;
THOMAS D. CHRISTOPOUL;
WILLIAM G. HELTON, JR.,
PAUL M. MCNICOL;
ANDREW RUSSELL;
MAYO S. STUNTZ, JR.;
DARREN CARTER;
MICHAEL WIDENER;
CLINTON C. COOPER;
MARY SCHRAD, PILOT GROUP LLC,
PILOT GROUP L.P., and PGCE, INC.,**

Defendants.

FILED '09 APR 20 16:01 USDC-ORE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | | |
|-------------------------------|---|----------------------|
| LINDLEY CONTOURS, LLC, AND |) | |
| NORMAN LINDLEY, |) | |
| Plaintiffs |) | Civil No. 08-6408-TC |
| |) | |
| v. |) | FINDINGS AND |
| |) | RECOMMENDATION |
| ABBA FITNESS HOLDINGS, INC., |) | |
| f/k/a CONTOURS EXPRESS, INC., |) | |
| et al., |) | |
| |) | |
| Defendants |) | |

COFFIN, Magistrate Judge:

Presently before the court is defendants' motion (#6) to dismiss for arbitration, or, in the alternative, to dismiss certain defendants for lack of jurisdiction. For the reasons set forth below, this action should be dismissed.

Factual Background

This case arises from a dispute between a franchisee and franchisor. Their business relationship is governed by terms of their franchise agreements which state that disputes shall be determined by binding arbitration. Plaintiff Lindley Contours, LLC, does not dispute the existence or general applicability of the arbitration clause, but contends that it was waived.

Legal Background

Waiver of the right to arbitrate is not favored under the law. Fisher v. A.G. Becker Paribas, Inc., 791 F.2d 691, 694 (9th Cir. 1986). An examination of whether the right to seek arbitration has been waived must be conducted in light of the "strong federal policy favoring enforcement of arbitration agreements." Id. A party arguing that an arbitration agreement was waived bears a "heavy burden." Id.

In order to prove that a party waived its right to compel arbitration, the party opposing the arbitration must demonstrate:

- (1) knowledge of an existing right to compel arbitration;
- (2) acts inconsistent with that existing right; and
- (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.

Id.

Discussion

As discussed in more detail below, plaintiff did not meet its burden of demonstrating that the arbitration agreement has been waived. The first prong of the waiver test is met. However, it is less than clear if the second required prong of the waiver test is met. And it is clear the third required prong of prejudice is not met. Demonstrating prejudice to the party arguing in favor of waiver is "no easy task." Hoffman v. Swift Transp. Co., Inc., Civ.No. 07-321-AS, 2007 WL 4268769 at *2 (D. Or. Nov. 30, 2007).

Plaintiff argues that certain defendants took actions in a prior related action in a state court in Missouri that were inconsistent with their right to arbitrate, see Opposition (#23) at p. 2. Plaintiff also argues that it was prejudiced by such acts.

Defendants cite several persuasive cases where it was held that engaging in litigation prior to asserting arbitration rights did not amount to a waiver of the right to arbitrate. See p.p. 7-12 of Reply(#26). For example, in Britton v. Co-op Banking Group, 916 F.2d 1405, 1413 (9th Cir. 1990) the court did not find prejudice despite two previous years of discovery and motion practice. In Allied v. Systems Co. v. Marinetter Marine Corp., Civ. No. 99-368-ST, 1999 WL 632708 (D. Or. Aug. 20, 1999), the court rejected arguments of waiver despite a full range of litigation activities spanning over 13 months in a prior action. Defendant in the prior action had not asserted the right to arbitration, but instead filed a motion to dismiss, filed discovery requests and took depositions, and filed an answer and counterclaim. The Allied Court rejected an argument that there was prejudice based on the time and resources spent on discovery in the previous case and cited Britton. The Allied Court noted that defendant had done nothing in its second case except file the motion for arbitration. Such situation is generally similar to the case presently before this court - - including the fact that defendants here have only removed this action and filed the present motion regarding arbitration and personal jurisdiction.

It is also noteworthy that the prior claims asserted by Lindley Contours in Missouri did not include claims asserted in this action. Claims asserted in this action, but not in the prior Missouri action,

include claims for violations of the Oregon Franchise Act, common law fraud, negligent misrepresentation, and violations of Oregon's Unlawful Trade Practices Act. Moreover, there are several new defendants in the present action who were not named in the prior Missouri action. Plaintiff conceded at oral argument that these new defendants' personal assets are at risk in the present action. The new defendants did not do anything in the Missouri action, and, as such, they obviously have not acted inconsistently with their arbitration rights in Missouri. Nor have they acted inconsistently with their arbitration rights in the present action. And there can be no prejudice to plaintiff resulting from their lack of inconsistent action in either lawsuit.¹

Plaintiff did not meet its burden of demonstrating that the arbitration agreement has been waived.

All of plaintiff's other arguments have been considered and found unpersuasive.

¹Plaintiff cites Hoffman Construction Co. of Oregon v. Active Erectors, 969 F.2d 796 (9th Cir. 1992) and summarizes that case as one in which the "party who litigated in state court waived right to compel arbitration in subsequent action raising a new legal claim based on the same facts in federal court," Opposition(#23) at p. 14. However, Hoffman Constructive Co. is legally and factually distinguishable from the case before this court: Unlike the situation in the present case, the previous related state court case discussed in Hoffman was taken all the way through a lengthy trial, and, moreover, the Hoffman court based its decision on res judicata. It should also be noted that the case presently before this court has several new defendants and several new claims not in the prior case in Missouri.

Conclusion

Defendants' motion (#6) to dismiss should be allowed and this action should be dismissed.

DATED this 20th day of April, 2009.



THOMAS M. COFFIN
United States Magistrate Judge

FILED '09 JUN 11 11:34 USDC-ORE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LINDLEY CONTOURS, LLC, AND,
NORMAN LINDLEY,

O R D E R

Civ. No. 08-6408-TC

Plaintiffs,

vs.

ABBA FITNESS HOLDINGS, INC.,
f/k/a CONTOURS EXPRESS, INC.,
et al.,

Defendants.

AIKEN, Judge:

Magistrate Judge Coffin filed his Findings and Recommendation on April 20, 2009. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When a party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a de novo determination of that portion of the Magistrate's report. 28 U.S.C. § 636(b)(1)(B); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Plaintiffs have timely filed objections. I have, therefore, given the file of this case a de novo review. I ADOPT the

1 Magistrate's Findings and Recommendation (doc. 30) that
2 defendants' motion to dismiss (doc. 6) is granted. This case is
3 dismissed.

4 IT IS SO ORDERED.

5 Dated this 9 day of June 2009.

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10 Ann Aiken
11 United States District Judge
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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

LINDLEY CONTOURS, LLC, and
NORMAN LINDLEY,

Plaintiffs,

v.

Civil No. 08-6408-TC

AABB FITNESS HOLDINGS, INC.,
f/k/a CONTOURS EXPRESS, INC., et al,

Defendants.

JUDGMENT

This action is dismissed.

Dated: June 11, 2009.

MARY L. MORAN, ACTING CLERK OF COURT

by



Leslie Engdall, Deputy

JUDGMENT

DOCUMENT NO: _____

REPRESENTATION STATEMENT

W. Michael Garner, Esq.
Dady & Garner, P.A.
5100 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Phone: 612-359-3515
Facsimile: 612-359-3507
Email: wmgarner@dadygarner.com

ATTORNEYS FOR PLAINTIFF LINDLEY CONTOURS, LLC

John F. McGrory, Jr.
David Wright Tremaine, LLP
1300 S.W. 5th Avenue
Suite 2300
Portland, OR 97201
Phone: 503-241-2300
Facsimile: 503-778-5299
Email: johnmcgrory@dwt.com

ATTORNEYS FOR DEFENDANTS

Edward R. Spalty
David A. Jermann
Armstrong Teasdale LLP
2345 Grand Boulevard
Suite 2000
Kansas City, Missouri 64108-2617
Phone: 816-221-3420
Fax: 816-221-0786
Email: espalty@armstrongteasdale.com
djermann@armstrongteasdale.com

ATTORNEYS FOR DEFENDANTS

U.S. District Court

DADY & GARNER, P.A. TRIAL LAWYERS

22139

| DATE | INVOICE # | REFERENCE | AMOUNT |
|------------|-----------|-----------|--------|
| 07/07/2009 | 070709 | Lindley | 455.00 |

Civil Case No: 6-08-6408-TC

ORIGINAL DOCUMENT HAS FLUORESCENT FIBERS, A VOID PANTOGRAPH AND A MICROPRINT SIGNATURE LINE

DADY & GARNER, P.A.

TRIAL LAWYERS

5100 IDS CENTER, 80 SOUTH 8TH STREET

MINNEAPOLIS, MN 55402

PH. 612-359-9000 FAX 612-359-3507

US BANK

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DATE

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U.S. District Court
for the District of Oregon

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ORDER OF

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